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MEMORANDUM OF LAW

DATE: January 29, 2016

TO: Charter Review Committee

FROM: City Attorney

SUBJECT: San Diego Charter section 32.1 and Subpoena Power

INTRODUCTION

At the November 4, 2015 meeting of the Charter Review Committee (Committee), the Committee requested the City Attorney provide a legal analysis of the City Council's (Council) power to subpoena information from the Mayor or other city officers, including how subpoena power would or would not change the current legal relationship between the Council and the Mayor and his staff; and if Council desires subpoena power, whether an ordinance or amendment to the San Diego Charter (Charter) is necessary to provide subpoena power.

QUESTIONS PRESENTED

1. What are the current obligations of the Mayor and other City officers to provide information to the Council under the Charter?
2. Is subpoena power necessary to require officials to comply with current Charter requirements?
3. If the Council wishes to exercise subpoena authority more broadly than currently provided in the Charter or the California Government Code (Government Code), can they do so by ordinance or is a Charter amendment necessary?

SHORT ANSWERS

1. Charter section 32.1 requires the Mayor and non-managerial officers to inform the Council of material facts or significant developments of matters within the Council's jurisdiction. This duty is self-executing and thus does not require the Council to first request information. The Mayor and non-managerial officers must provide material facts or significant

developments that may affect the Council's ability to make an informed decision prior to any Council decision on a matter within its jurisdiction. In addition, Charter sections 265(b)(13) and 270(h) require the Mayor to respond to requests for budget information and give the Council the authority to summon any City official or department head to appear before the Council or committee to provide information or answer questions.

2. Subpoena power is not necessary because the Council can summon an official or department head to provide information or answer questions. Furthermore, the Council has subpoena power as provided for in the Government Code.

3. If Council desires subpoena authority broader than what is currently provided in the Charter or the Government Code, that authority must be included in the Charter.

ANALYSIS

I. THE CHARTER REQUIRES OFFICERS TO PROVIDE THE COUNCIL INFORMATION

The Charter defines the roles of the Mayor and the Council. In general, the Mayor is responsible for the day-to-day administrative affairs of the City. San Diego Charter §§ 28 and 265. The Council is the legislative body and sets policy. San Diego Charter §§11 and 11.1. Because the Council does not have an administrative role, it must rely on the Mayor and administrative staff for information and advice.

Voters added Charter section 32.1 to the Charter in 1992. It requires the City Manager and all non-managerial officers of the City of San Diego (City) to inform the Council of "material facts or significant developments" on matters before the Council. Charter section 32.1 states:

Section 32.1: Responsibility of Manager and Non-managerial Officers to Report to Council

The City Manager and all non-managerial officers of the City shall inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council as provided under this Charter except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Manager and all non-managerial officers shall also comply promptly with all lawful requests for information by the Council.

San Diego Charter § 32.1.

The ballot argument in favor of the Charter amendment stated that the section: “is necessary to assure the citizens and taxpayers of this City that its elected officials are fully and completely informed by the City staff concerning all material and significant developments under the City Council’s jurisdiction.”¹ The argument referenced the City Manager’s failure to disclose to the Council allegations of sexual harassment in the Planning Department and noted: “[u]nless the Mayor and Council members are fully informed about all material circumstances, how can they be expected to diligently and intelligently make those hard decisions?”²

The responsibilities are two-fold: (1) inform the Council of all material facts or significant developments related to matters under the Council’s jurisdiction, and (2) comply promptly with all lawful requests for information by the Council.³ The responsibility to inform of significant developments is self-executing and thus requires no request from Council.

Charter section 32.1 applies to the Mayor and all “non-managerial officers.”⁴ “Non-managerial officers” refers to those City officers who do not report to the Mayor. Several Council Policies refer to “non-managerial” departments as those separate from the departments under the City Manager’s authority. *See* Council Policies 300-10 and 700-37; San Diego Charter §§ 38, 39.2, 39.3, 40, 41(c).

II. THE CHARTER REQUIRES THE MAYOR TO PROVIDE INFORMATION UPON REQUEST TO THE COUNCIL

The Committee requested an analysis of providing the Council subpoena power to request information under Charter section 32.1. Black’s Law Dictionary defines subpoena as, “A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.” Black’s Law Dictionary 1654 (10th ed. 2014). Section 32.1 is silent regarding subpoena power, but the Council already has several methods to request information.

The Mayor is required to respond to requests for information regarding the budget process and the fiscal condition of the City pursuant to Charter section 265(b)(13). The Council also has the power to summon the Mayor, other officials, or department heads pursuant to section 270(h). The Charter provides, “Any City official or department head in the administrative service may be summoned to appear before the Council or any committee of the Council to provide information or answer any question.” San Diego Charter § 270(h).^{5,6} The San Diego Municipal Code (Municipal Code) reinforces this requirement by providing that the Mayor or appropriate department is, upon a request by a standing committee, to “cooperate fully in

¹ *See*, Ballot Pamp., Primary Elec. (June 2, 1992), argument for Prop. D.

² *Id.*

³ *See* 2009 City Att’y Report 613 (2009-27; Oct. 27, 2009), pp. 3-4, attached, for analysis of what constitutes “material” and “prompt.” “Material” means information that could influence Council decisions. What is considered “prompt” is dependent on the nature and circumstances of a specific request.

⁴ The City Manager’s responsibilities in Charter section 32.1 were transferred to the Mayor on January 1, 2006 as part of the new Strong Mayor form of government. *See* San Diego Charter § 260.

⁵ To the extent Council summons officers with Charter mandated duties, the power to summon may be subordinate to a particular duty; for example, Council would not be able to interfere with the Auditor’s duty to conduct audits under Charter section 39.2.

⁶ Charter section 270(h) allows the Council to summon department heads, but department heads have no individual duty to inform Council of developments pursuant to Charter section 32.1, apart from the Mayor’s duty to inform.

providing the information required by the committee.” SDMC § 22.0101, Rule 6.5.3. Rule 6.5.3 also requires the committee consultant to “make inquiry of the Mayor or appropriate department” to determine the fiscal impact of a proposal referred to the committee before acting on the matter. *Id.*^{7,8}

Broad legislative subpoena power has long been recognized as essential to enforce a legislative body’s power of inquiry. *Connecticut Indem. Co. v. Superior Court*, 23 Cal. 4th 807, 813 (2000), *citing McGrain v. Daugherty*, 273 U.S. 135 (1927). While there is no procedure for general legislative subpoena power either in the Charter or in the Municipal Code, Charter section 2 provides that the City “is authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted by General Laws of the State.” As the legislative body of the City, the Council can exercise general legislative subpoena power according to the procedure provided by the Government Code. Cal. Gov’t. Code §§ 34000, 37104.

A “legislative body may issue subpoenas requiring the attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding before it.” Cal. Gov’t. Code § 37104. Courts broadly interpret “action or proceeding before it” to encompass all investigations within the legitimate functions of a legislative body, requiring no pending formal proceedings. *City of Vacaville v. Pitamber*, 124 Cal. App. 4th 739, 748 (2004). This procedure would allow Council to subpoena members of boards and commissions, as well as outside parties, for information pertaining to a Council investigation.

III. THE COUNCIL CAN PROVIDE FOR SUBPOENA POWER IN CONFLICT WITH STATE LAW BY CHARTER

The Council may wish to exercise subpoena power as opposed to a request under Charter section 265(b)(13) or a summons under Charter section 270(h). A legislative subpoena issued pursuant to the Government Code requires the Mayor’s signature, so it may not be an effective tool for the Council to require the Mayor or Mayoral departments to provide information. Cal. Gov’t. Code § 37105. However, subpoena power regarding issues before the Council is a municipal affair, so general law provisions governing legislative subpoenas do not bind the City. *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 236 (1976).

If the Council wished exercise legislative subpoena power under different terms than provided by the Government Code, it should provide for legislative subpoena power in the Charter. The powers and duties of public officers are derived by charter and ordinances passed pursuant to the charter. *Wilbur v. Office of City Clerk of City of Los Angeles*, 143 Cal. App. 2d 636, 643 (1956). “When a charter creates a public office or body, the charter is the source of the body’s or officer’s authority and responsibilities.” 2010 City Att’y MOL 312 (2010-12; Jun. 10, 2010), *citing* 2A McQuillin Mun. Corp. § 9:3 (3rd ed. 2010). Currently, the Charter provides the

⁷ Rule 6.5.4 gives the Mayor and other officials the right to attend and participate in committee meetings, whether they choose to attend or attend by Council request. SDMC § 22.0101. This rule does not relieve officials of any Charter obligations, including the duty to provide information pursuant to Charter section 32.1. Nor does this rule relieve officials of cooperating fully to provide information pursuant to Rule 6.5.3.

⁸ This Office has previously recommended the creation of a mutually agreeable policy or procedure to handle the dissemination of information required by the Charter. 2009 City Att’y Report 613 (2009-27; Oct. 27, 2009), p. 4, attached.

Council subpoena power only for judging the “election and qualification of its members,” and to conduct investigations relating to the Civil Service provisions of the Charter and Civil Service rules. San Diego Charter §§ 14, 128. The Council can further exercise legislative subpoena power as provided by the Government Code pursuant to its authority to exercise powers granted under California General Law. San Diego Charter § 2. Since the Charter defines the Council’s authority, voters may grant Council authority to subpoena upon terms that differ from the Government Code via Charter amendment.

CONCLUSION

The Mayor and non-managerial officers have a duty to inform the Council of material facts or significant developments regarding matters within the Council’s jurisdiction. This duty is self-executing and does not require Council to first request information. If the information is not forthcoming, the Council may summon any City official or department head to answer questions and provide information. If the Council wishes to have subpoena authority broader than currently provided in the Charter or state law, the authority would need to be provided in the Charter.

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By /s/ Jennifer L. Berry
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JLB:sc:ccm
Attachment
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October 27, 2009

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND
INTERGOVERNMENTAL RELATIONS

PROPOSED CHARTER AMENDMENTS RELATING TO THE MAYOR-COUNCIL FORM
OF GOVERNANCE.

INTRODUCTION

On October 14, 2009, the Committee on Rules, Open Government, and Intergovernmental Relations [Committee] began discussions of the June 2010 ballot measure to continue the Mayor-Council form of governance. During the meeting, questions were raised about other possible amendments to the Charter relating to the relationship between the Mayor and the Council. This report answers these questions as more fully set forth in an October 14, 2009 memorandum from Council President Ben Hueso.

DISCUSSION

I. HOUSEKEEPING

The Committee suggested that the Charter be amended to change "City Manager" to "Mayor" as appropriate. This suggestion was raised in our October 9, 2009 report to the Committee. This would require an integrated version of the ballot measure that would remove Article XV from the Charter and move its provisions into other sections of the Charter.

The "short version" provided to the Committee contains a provision that states: "All executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX shall be transferred to, assumed, and carried out by the Mayor during the period of time this Article is operative." If the "short version" is used, it is not necessary to make the suggested housekeeping changes. On the other hand, an integrated version of the ballot measure would make changes to replace "City Manager" to "Mayor" throughout the Charter. Our Office will provide an integrated version of the ballot measure to the Committee if requested to do so.

II. TITLE

The Committee has suggested that the title of Article XV be changed from "Strong Mayor Form of Governance" to "Strong Mayor/Strong Council Form of Governance." The purpose of Article XV was to: "modify the existing form of governance for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor form

of government.” Charter § 250.¹ The Charter requires the Council to place a measure on the ballot to make Article XV permanent. Charter § 255(c). Currently, the “short form” ballot measure shows the title of Article XV as: “Strong Mayor Trial Form of Governance.” In order to fulfill the direction in the Charter, we recommend that the title of Article XV remain as suggested in the “short version.”

There are two options to resolve this issue. First, if the Council decides to use an integrated ballot measure, Article XV would be removed and there would be no title to modify. The provisions in Article XV would be moved to other portions of the Charter. Second, a separate ballot measure may be placed before the voters in June 2010 or at a later time to amend the title of Article XV.

III. APPOINTMENTS

The Committee has suggested that the Charter be amended to give the Council power to make appointments of Councilmembers to outside organizations. With respect to appointments to these non-City boards, Charter section 265 states:

(b) . . . [T]he Mayor shall have the following additional rights, powers, and duties:

(12) Sole authority to appoint City representatives to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor.

An amendment to section 265(b)(12) would need to be presented in a ballot measure separate from the measure considering the continuance of the current form of government. Although additional research may be necessary, the following language is provided for discussion:

(12) Sole authority to appoint City representatives to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor. If the controlling law requires the appointee to be a Councilmember, the Council shall make the appointment unless the controlling law vests the power in the Mayor or a City Official other than the Council.

This language provides that the Council will make appointments when the controlling law requires the appointee to be a Councilmember, unless the appointment authority is otherwise provided for by law. The Mayor will have the authority to veto a resolution making these

¹ The “Strong Mayor” form of government is also commonly referred to as a “Mayor-Council” form of government. See 2A McQuillin Mun. Corp. § 9:20 (3rd ed.) (2009).

appointments if it is determined that the appointment is not exclusively within the purview of the Council and does not affect the administrative service of the City under the control of the Mayor. Charter § 280(a).

IV. COMMUNICATION

The Committee has asked for guidance on the Mayor's obligation to provide information to the Council under Charter sections 28 and 32.1. The relevant portion of Charter section 28 requires the City Manager to: "keep the Council advised of the financial condition and future needs of the City; to prepare and submit to the Council the annual budget estimate and such reports as may be required by that body." Charter section 32.1 is less specific about the type of information the Manager must provide to the Council:

The City Manager and all non-managerial officers of the City shall *inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council* as provided under this Charter except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Manager and all non-managerial officers shall also *comply promptly with all lawful requests for information by the Council*. [Emphasis added].

The responsibility of the Manager to provided information under sections 28 and 32.1 has been transferred to and assumed by the Mayor during the 5 year trial period of the Mayor-Council form of governance. Charter § 260(b).

The Committee has asked various questions about these sections: (1) how long after learning of all material facts or significant developments should the Council be informed of such information; (2) how long after Council makes a lawful request should the Mayor and/or department heads be required to provide the information; and (3) can the Council require that information be given to the Council within a reasonable time before the information is disseminated to outside parties.

As discussed below, we cannot recommend any specific time period for the Mayor to provide information to the Council. In each case, the length of time to respond or provide information will be dependent on the specific facts and circumstances.

One of the circumstances that could affect the Mayor's obligation to provide information is whether the matter is within the Council's jurisdiction. The separation of powers doctrine applied to federal and state governments is not generally applicable to mayor-council plans of government. *Casamasino v. City of Jersey City*, 158 N.J. 333, 343, 730 A.2d 287, 293 (1999) However, *principles* of separation of powers are applicable where the source of the powers, in our case the City Charter, has specifically delegated to the Mayor and to the Council separate functions. Where one branch of government has been specifically vested with the authority to act in a prescribed manner, neither of the other branches may usurp that authority. *Ibid*.

The Mayor is in charge of the day to day activities of the City. He is required to prepare the budget and other financial information for Council consideration. He also supervises the administration of the City's affairs. Charter § 28. While the Council has oversight and makes final decisions on legislative and budgetary matters, the requests for information must be within the Council's jurisdiction.

Another factor to consider is whether the information is "material." "Material" is defined as: "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Blacks Law Dictionary 1066 (9th ed. 2009). Applying this definition to section 39.1, it appears that the Mayor must inform the Council of material facts or significant developments when the Council is making a decision where knowledge of such facts would affect the decision. To apply a broader interpretation would place the Mayor in the difficult position of constantly determining whether an event is significant enough to disclose to the Council even though there may be no decisions pending at that time. Nonetheless, we recommend that the Mayor use his best judgment to keep the Council informed of significant matters as appropriate, even if no decision is contemplated at that time.

Second, Blacks Law Dictionary states that the meaning of "promptly" depends largely on the facts in each case. What is "prompt" in one situation may not be considered such under other circumstances or conditions. Blacks Law Dictionary 1214 (6th ed. 1990). We note that the California Public Records Act requires that an agency "make records promptly available". Cal. Gov't Code § 6253(b). However, the Act allows 10 days to respond to a request for records, which timeline may be extended up to 14 days in unusual circumstances. Cal. Gov't Code § 6253(c). Accordingly, it would not be appropriate to specify a particular length of time for the Mayor to provide requested information. Instead, the obligation to "promptly" comply with a request for information will depend on the nature and circumstances of the request.

Third, the question of the timing of the release of information to the public and the Council may also depend on the circumstances. There may be situations where the nature of the matter is such that simultaneous release of information to the Council and the public may be necessary or appropriate.

The Charter gives the Council the ability to request information from the Mayor. In addition, Council committees may request any City official or department head to provide information or answer any questions. Charter § 270(h). Accordingly, we do not recommend any changes to the Charter. However, the Mayor and Council may wish to discuss a mutually agreeable policy or procedure to handle the dissemination of information.


CONCLUSION

The Committee has suggested amendments to the Charter relating to the current Mayor-Council form of government. It is also suggested that these amendments be included in the ballot measure required under Charter section 255(c). As we noted in our October 9, 2009 report, this provision is intended to have the voters determine whether to continue the Mayor-Council form of government, add a Council district, and increase the veto override. It does not authorize

additional amendments to the Charter in the ballot measure. Accordingly, if the Council wants the voters to consider further alterations or refinements to this form of governance, a second companion ballot measure would be necessary.

Respectfully submitted,

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